U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 09Jul2002

CASE NOS.: 2001-LHC-00012
2001-LHC-00766

OWCP NOS.: 01-150056
01-124702

In the Matter of

ADELMO INTRIERI
Claimant

v.

ELECTRIC BOAT CORPORATION
Self-Insured Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

David N. Neusner, Esquire (Embry & Neusner),
Groton, Connecticut, for the Claimant

Mark Oberlatz, Esquire (Murphy & Beane),
New London, Connecticut, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS AND SPECIAL FUND RELIEF

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by Adelmo Intrieri (the Claimant) against the Electric Boat Corporation (the Employer) under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the Act). After

an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs (OWCP), the matter was referred to the Office of Administrative Law Judges for a formal hearing which was conducted before me in New London, Connecticut on July 13, 2001. The hearing afforded all parties an opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. The Director, OWCP did not appear, having advised by letter dated March 9, 2001 that it had received notice of the Employer's application for Special Fund Relief pursuant to 33 U.S.C. §908(f) and did not wish to participate in the hearing. Administrative Law Judge Exhibit "ALJX" 14.[1] The Claimant testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits CX 1-17 and Employer's Exhibits RX 1-7, 9 and 10. TR 9-10, 16.[2] At the close of the hearing, the record was held open to September 13, 2001 to afford the parties an opportunity to offer the transcripts of witness testimony taken at post-hearing depositions and to file written closing argument. No deposition transcripts were offered, and the record was closed after the Claimant's attorney timely submitted his closing argument.

Since the Employer's attorney had indicated at the hearing that he wished to file a written closing, he was contacted to determine whether one had been submitted and possibly misplaced. By letter dated June 17, 2002, the Employer moved to reopen the record to admit the deposition transcript of Dr. Willetts' testimony taken on July 24, 2001 and for receipt of the Employer's closing argument. The Claimant responded, objecting to the late filing of the Employer's closing argument but not to the deposition transcript which has been admitted as Employer's exhibit RX 11. Alternatively, the Claimant has offered a November 26, 2001 notice from the Social Security Administration awarding the Claimant disability benefits. Noting the absence of any showing apparent prejudice to the Claimant, and that the Employer's failure to timely submit it's closing argument is attributable to an excusable oversight, the argument has been accepted. Accordingly, the Social Security Administration notice offered by the Claimant has been admitted as Claimant's Exhibit CX 18, and the record is now closed.

After careful analysis of the evidence contained in the record I conclude that the Claimant is entitled to awards of permanent partial and permanent total disability compensation with interest, medical care and attorney's fees. I also conclude that the Employer is entitled to a credit for past voluntary temporary disability compensation payments and Special Fund relief from its liability for the Claimant's permanent disability compensation. My findings of fact and conclusions of law are set forth below.

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[1] Documentary evidence will be referred to herein as "CX" for an exhibit offered by the Claimant, "RX" for an exhibit offered by the Employer, "JX" for a joint exhibit, and "ALJX" for the formal papers. References to the hearing transcript will be designated as "TR".

[2] The Claimant's objection to Employer's exhibit RX 8, a June 29, 2001 report from Philo F. Willetts, Jr., M.D. was taken under advisement at the hearing and will be addressed *infra*. TR 13-15.

II. Stipulations and Issues Presented

The parties have offered the following stipulations:

(1) there are two injuries in this case, a July 19, 1992 injury and a June 8, 2000 injury, and the parties are in agreement that the Act applies to the July 19, 1992 injury;

(2) both injuries occurred in the course and scope of employment;

(3) there was an employer-employee relationship at the time of both injuries;

(4) the Employer was timely notified of both injuries, claims were timely filed for both injuries, and the notice of controversion was timely filed for both injuries;

(5) the average weekly wage at the time of the July 19, 1992 injury was $668.16, and the average weekly wage at the time of the June 8, 2000 injury was $128.00;

(6) medical benefits have been paid;

(7) periods of temporary total and temporary partial disability compensation have been paid to the Claimant;

(8) the date of maximum medical improvement for the July 19, 1992 injury is November 6, 1996;

(9) in the event that the Court finds that the Claimant is not totally disabled and has a wage-earning capacity, his wage earning capacity is $147.28 per week; and

(10) the weekly compensation rate for the June 8, 2000 injury should be $128.00 based on the Act's minimum compensation provision.

TR 16-20, 24. The parties further agreed that the unresolved issues are (1) whether the June 8, 2000 injury falls under the jurisdiction of the Act, (2) the nature and extent of the Claimant's disability, particularly since June 8, 2000, and (3) the Employer's entitlement to Special Fund relief. TR 19-20.

The Claimant seeks an award of permanent partial disability compensation under section 8(c)(21) of the Act based on the July 19, 1992 injury and an award of permanent total disability compensation under section 8(a) of the Act for his June 8, 2000 injury. TR 22; Claimant's Closing Argument at 1. The Employer contends that the Claimant's June 8, 2000 injury falls outside of the Act's jurisdiction because the Claimant was employed at the time exclusively to perform security work withing the meaning of section 2(3)(A) of the Act which excludes security personnel from the definition of an employee. Employer's Closing Argument at 1. The Employer

further contends that even if the June 8, 2000 injury is determined to be covered by the Act, the Claimant is, at most, entitled to a short period of temporary total disability because the medical evidence establishes that he quickly regained the ability to perform his light duty assignment at the Employer. Employer's Closing Argument at 2. Finally, the Employer seeks Special Fund relief from its liability for permanent disability compensation benefits awarded on either the July 19, 1992 injury or the June 8, 2000 injury.

III. Ruling on Employer's Exhibit RX 8

The Employer has offered a June 21, 2001 letter from Dr. Willetts who reviewed medical records from Dr. Sculco and a surveillance videotape reportedly taken of the Claimant on May 11, 2001. In the letter, Dr. Willetts summarizes the contents of the videotape which was not offered in evidence, and he reaches certain conclusions regarding the Claimant's ability to work based on his observation of the videotape. The Claimant objects to the admission of the letter, asserting that the videotape itself, and not Dr. Willetts' narrative, constitutes the best evidence.

Section 23(a) of the Act provides that common law or statutory rules of evidence are not binding on an ALJ. 33 U.S.C. §923(a). *See also Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147, 151-52 (1997) (ALJ has greater discretion in admitting expert evidence than district courts which are bound by Rule 702 of the Federal Rules of Evidence and the Supreme Court's decision in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993)); *Sprague v. Director, OWCP*, 688 F.2d 862, 869 n.16 (1st Cir. 1982) ("nothing in either the Act or the regulations promulgated pursuant to the Act indicates that the Federal Rules of Civil Procedure . . . apply to compensation proceedings). Further, the implementing regulations provide that an ALJ must receive into evidence all relevant and material testimony and documents; 20 C.F.R. §702.338; *Williams v. Marine Terminals Corp.*, 14 BRBS 728, 732 (1981); and surveillance films are clearly relevant in claims under the Act where extent of disability is in issue. *Walker v. Newport News Shipbuilding and Dry Dock Co.*, 10 BRBS 101, 105 (1979), *aff'd*, 618 F.2d 107 (4th Cir. 1980), *cert. denied*, 446 U.S. 943 (1980). Here, however, the Employer has not introduced the surveillance videotape viewed by Dr. Willetts, and the authenticity of that videotape has not been established by either testimony or stipulation. Under these circumstances, I find that although Dr. Willetts' opinion on the question of the Claimant's physical ability to work is certainly "relevant" and, therefore, admissible, the fact that his opinion is based on extra-record evidence which has not been properly authenticated is problematic and will have to be considered in determining what, if any, weight will be assigned. Therefore, the Claimant's objection is overruled, and RX 8 is admitted. In any event, the admission of RX 8 proves, as discussed *infra*, to be of minor evidentiary consequence in the in view of the fact that Dr. Willetts subsequently testified at his July 24, 2001 deposition that what he saw on the videotape was consistent with the opinions that he had previously expressed in an August 7, 2000 report.

IV. Summary of the Evidence

A. The Claimant's Testimony

The Claimant testified that he was born in Italy on August 8, 1951 and attended school for eight years in Italy before moving with his family to Westerly, Rhode Island. TR 27-28. He went to school for one year in Rhode Island, but he could not speak English at the time and quit after one year to go to work. TR 28. He stated that his English reading and writing skills are very poor so that he is unable to read an English newspaper or write a letter in English. TR 29.

After quitting school, the Claimant went to work first as a landscaper and then running a machine in a textile mill where he worked alongside other recent immigrants for about seven years. He next worked for two years operating an "autoplate" machine and then returned to the textile mill for about four months, after which he was hired by the Employer in December 1976 to work as a painter. TR 28, 30-31. As a painter, the Claimant testified that he did sandblasting, painting with sprayers and rollers, and cleaned up debris. TR 31-32. He testified that he worked on vessels under construction in the Employer's shipyard and had to climb ladders, carry equipment and frequently squeeze into confined spaces. TR 33-34.

On July 18, 1990, the Claimant stated that he injured his right shoulder while at work when he slipped on an oily surface while exiting a tank on a submarine and grabbed onto some cables to maintain his balance. He felt pain in his shoulder and went to the Employer's yard hospital which sent him to Dr. Carlow. He testified that he was out of work for four to six weeks and continued to feel pain in the shoulder after he returned to work. The Claimant stated that his shoulder never fully recovered from this injury, but he was assigned to his regular painter duties despite making complaints of pain to his supervisor. TR 35-36.

The Claimant testified that he suffered a second injury at work in May 1991 when he was assigned to work in a tight area, slipped on oil while trying to squeeze himself in and fell, hitting his head and feeling pain in his shoulder. TR 36-37. He went to the yard hospital which sent him to Dr. Willetts who, in turn referred him to Dr. Brogna. TR 37. According to the Claimant, Dr. Brogna diagnosed carpal tunnel syndrome and returned him to work. TR 38-39. However, he stated that the same right shoulder pain returned, and Dr. Brogna referred hin to Dr. Sculco, his current treating physician. The Claimant said that Dr. Sculco sent him out for a MRI which showed disc damage in his neck, and he was taken out of work again for two or three weeks of physical therapy. TR 39. After the physical therapy, he returned to work at the Employer on light duty which involved painting buildings and no work on boats or climbing ladders. TR 39-40. Although he was on light duty, the Claimant said that he continued to experience neck and shoulder pain. TR 40.

On July 19, 1992, while he was still on light duty, the Claimant was assigned along with two other employees to move a heavy sandblasting hose. In the process of accomplishing this task, the Claimant attempted to lift a five gallon bucket of paint, which he estimated to weigh between 80 and 100 pounds. TR 40-41. He stated that this caused him pain in his shoulder for which he sought treatment from Dr. Brogna. The Claimant testified that Dr. Brogna took him out of work and administered cortisone shots and other medication. TR 41-42. He stated that he

returned to work with some absences over the next two years due to recurring problems with neck and shoulder pain. TR 42.

In September 1994, the Claimant underwent cervical fusion surgery in which he said that a plate and screws were implanted. TR 42. He was out of work from July 1994 until January 1995 when he returned to work for ten days on restricted duty, washing respirators in the Employer's respirator room. TR 43. He stated that he was then assigned to another job which he could not do, and he was sent home. TR 43-44. The Claimant stated that he continued to feel pain and cold in his back and shoulder after the surgery, and Dr. Sculco referred him to Dr. Cambridge for evaluation of his shoulder. He said that Dr. Cambridge diagnosed a torn rotator cuff and recommended surgery which he reluctantly underwent in January 1996. TR 44-45. Following this surgery, the Claimant discovered that his shoulder condition was worse. He saw Dr. Sculco who recommended another surgical procedure on his back to repair the plates that had been previously installed, but he declined further surgery. TR 45-46. Since the January 1996 surgery, the Claimant testified that his right shoulder gets tired and continues to give him pain. He said that he has limited reach and that he has difficulty raising his right arm above shoulder level. TR 46. He also said that he has continued to have intermittent pain in his neck which is aggravated by damp, cold weather. TR 47.

In January 1997, the Claimant returned to work at the Employer on a light duty assignment as an escort. TR 48. At that time, he had restrictions against reaching above shoulder level, bending and prolonged sitting. TR 48. As an escort, he was assigned to accompany contractors and vendors who were working in the shipyard without security clearances. It was his responsibility to stay with the contractors while they performed their work to ensure that there was no theft or improper access to restricted areas. TR 88-89. He escorted the contractors and vendors to work areas around the Employer's shipyard, including the building ways by the water and a "wet" or "floating" dock on the water. TR 51. The contractors whom he escorted sandblasted and painted cranes and erected buildings. TR 52. Although some of the contractors and vendors worked onboard submarines, the Claimant said that he did not go on the submarines as an escort because of his restrictions. Instead, he would call a supervisor who would arrange for another escort to accompany the contractor while working on the submarine. TR 52, 89. The Claimant performed the escort work on a part-time basis when work was available. He stated that he would report to work every day but was often sent home by 10:00 a.m. because there was no work. Most of his work as an escort was performed outside in the shipyard. TR 52-53.

In 1998, he underwent another MRI which showed disc damage in the lower back. TR 49. He received epidural injections from Dr. Sculco which helped, but he developed an allergic reaction to the injections, and they were stopped. TR 50. He said that his lower back pain increased over time and that he has difficulty standing or sitting for long periods of time. TR 50. The Claimant also testified that he had problems with his hands "falling asleep" at night after his return to work. He was seen by Drs. Brogna and Sculco, and carpal tunnel release procedures were performed in December 1997 and February 1998. TR 54-55. The Claimant stated that the release procedures provided improvement, though he still has some numbness and tingling as well

as cramping in his small fingers with use such as using a screwdriver or hanging curtains. TR 56-58.

He stated that Dr. Sculco released him to return to work at the Employer as a part-time escort in May 1998. TR 57; CX 5 at 63. Between May 1998 and June 2000, he worked as an escort on a part-time basis. He said that his low back was his biggest problem during this period. He reported trouble sleeping at night due to back and neck pain, feeling miserable and irritable and even falling asleep at times while at work. TR 58-59.

On June 8, 2000, the Claimant reported to work in the security office. While he was sitting in a chair, the telephone rang, and he went to answer it, moving across the floor on the chair. In the process, the chair hit a rug, and the Claimant fell and immediately felt pain. He remained at work for a few hours and then went home where he began to feel worse. TR 59-60. On June 9, he called the yard hospital and stayed home. The following week, he went in to the yard hospital where he was instructed to see his doctor. TR 60. He then saw Dr. Sculco who advised him to remain out of work and prescribed physical therapy, including "sonar jacuzzi" treatments at the local YMCA, but the Employer refused to authorize treatment at the YMCA. TR 60-61. He had two physical therapy sessions at the yard hospital where a machine was used on his back. The Claimant said that after this treatment, his legs "froze" so that it took him 30 minutes to complete what would normally be a five minute walk to his car. TR 61.

He went back to Dr. Sculco who stopped the physical therapy and prescribed alternate treatment consisting of epidural injections, pain medication (Percocet) and a muscle relaxant (Soma). TR 61-63. Dr. Sculco also recommended low back surgery which the Claimant has not gone forward with. TR 63. The Claimant stated that he tries to limit his use of Percocet to three or four per week because they make him sweaty and drowsy and because he is concerned about their effect on his liver. TR 63-65. In November 2000, Dr. Sculco released him to light duty work. He reported to the Employer but was told that no light duty work was available. TR 67-68.

The Claimant said that he currently has constant low back pain which is worse at times, feeling "like I got a spike in there, like a nail, like it feels really bad." TR 65-66. He also has constant neck pain and said that his ability to sit, stand and walk is limited. He tries to do a few things around his house and will walk a little or lie down to relieve his low back pain. TR 66-67. On cross-examination, he testified that he has done some projects at his home since January 2001. He stated that he had a sunroom added to his house by contractors and that he enlarged a deck by four feet and moved screens to accommodate the enlarged deck. TR 84-85. He said that he tries to work a little every day and is able to work for a few hours if he's feeling healthy. He has used a hammer, knife, electric saw to cut 2" x 4" lumber and a small drill to drive screws. TR 85. He acknowledged climbing stairs and standing on a chair while doing this work, and he has dome some overhead work. TR . He said that the longest that he worked on any day was between two and three hours. TR 86-87.

Since November 2000, the Claimant testified that he has unsuccessfully looked for work and kept a list (CX 10 and CX 13) of the employers he has contacted. TR 68, 77-83. He said that he had contacted five employers listed in a labor market survey compiled for the Employer, but he received no job offers and was unable to locate the other employers listed in the survey. TR 69. He stated that he does not mention physical limitations to employers when he applies for work unless he is specifically asked what he can and can not do. He said that most prospective employers have told him that they have no work available once they learn that he has no diploma and is unable to read and write English. TR 74-77.

B. Medical Evidence

Records from Steven B. Carlow, M.D. reflect that he saw the Claimant on August 2, 1990, at which time the Claimant complained of an acute injury to his right shoulder resulting from a slip at work on July 18, 1990. CX 5. Dr. Carlow's diagnosis was posterior capsulitis and tendinitis. He treated the Claimant conservatively and returned him to work in September 1990. *Id*. at 1-3. The Claimant returned to Dr. Carlow on October 2, 1990, stating that he had reinjured the right shoulder while working in a tight space. *Id*. at 4. Dr. Carlow prescribed a course of physical therapy and returned the Claimant to work again on November 12, 1990. His final diagnosis was bursitis and impingement of the right shoulder. He recommended against any surgical intervention as the Claimant appeared to be doing well. *Id*. at 5-6.

On June 3, 1991, the Claimant saw Philo F. Willetts, Jr., M.D. who assessed him with (1) a probable right shoulder girdle strain with possible cervical nerve root syndrome and (2) possible scapular nerve entrapment. Dr. Willetts referred the Claimant to physical therapy and encouraged him to returned to work on light duty. RX 4. It appears that the Claimant was then referred to a neurologist, Carlo G. Brogna, M.D. Dr. Brogna conducted electromyography (EMG) studies which he interpreted as positive for carpal tunnel syndrome, moderate on the right and mild on the left, but otherwise normal with respect to the Claimant's right upper extremity. He continued the Claimant on physical therapy and had him return to work with restrictions in July 1991. CX 7 at 1-6. Dr. Brogna's records reflect that the Claimant returned in September 1991, complaining of increased right shoulder and neck pain, especially after increasing his activities at work. Dr. Brogna adjusted the Claimant's medication and recommended additional physical therapy with ultrasound treatment. *Id*. at 7-8. However, the Claimant's complaints persisted, and Dr. Brogna referred him on September 30, 1991 to Dr. Sculco for further evaluation. *Id*. at 9. The Claimant was also seen in September 1991 for an evaluation by Robert J. Fortuna, M.D. at the request of the Employer's workers' compensation administrator. Dr. Fortuna's impression was status post cervical strain with a question of radiculopathy to the right arm. He stated that he considered the Claimant partially disabled with restrictions against repetitive overhead painting and lifting over 20 pounds, and he concluded that the Claimant's symptoms and findings were consistent with the injury reported on May 13, 1991. CX 8.

Mario J. Sculco, M.D., a neurosurgeon, saw the Claimant in October 1991 and had him undergo a MRI. CX 5 at 1-2. Upon review of the MRI, Dr. Sculco wrote to the Employer's workers' compensation administrator on November 12, 1991. reporting that the study showed a

significant herniated nucleus pulposus with significant deformity of the thecal sac and root sleeve element at C6-C7 on the right side which he found to be caused by the Claimant's May 13, 1991 injury at work. He stated that he hoped that the Claimant would respond to conservative treatment but added that the Claimant would be a candidate for cervical disc surgery if he failed to respond. *Id*. at 3-4. In December 1991, Dr. Sculco reported that the Claimant had resolving radiculoneuritis with a course of static traction, and he estimated that the Claimant would be disabled from work until at least February or March 1992. *Id*. at 5. On February 27, 1992, Dr. Sculco reported that the Claimant had persistent pain, though his motor weakness had improved, and he approved a return to light duty. *Id*. at 6. In May, he noted that the Claimant was tolerating light duty work quite well.

The Claimant reported the July 19, 1992 right shoulder injury while lifting a heavy bucket to the Employer which filed an Employer's First report of Injury with the OWCP. RX 3. On July 29, he was seen by Dr. Sculco whose impression was an acute cervical strain with nerve root irritation due to recent accident and possible shoulder injury. CX 5 at 8. Dr. Sculco initially prescribed rest followed by physical therapy, and he released the Claimant to return to work on light duty in the late fall. *Id*. at 9-10. In January 1993, Dr. Sculco recommended epidural steroid injections, and his records reflect that over the next year and one half, the Claimant continued to complain of neck, right shoulder and arm pain which increased with his painting activities at work and subsided with rest. *Id*. at 11-19. In July 1994, Dr. Sculco recommended cervical surgery, and the Claimant underwent a anterior decompression at the C5-C6 level, disc excision, osteophytectomy and stabilization (ventral plate and attaching screws) on September 2, 1994. *Id*. at 19-20, 26. Dr. Sculco approved the Claimant to return to light duty work in early February 1995 with restrictions against working overhead or in cramped tight quarters, overextension, reaching and lifting. *Id*. at 25. On April 12, 1995, the Claimant reported to Dr. Sculco that he had increasing neck, shoulder and arm pain and exacerbated symptoms to the point where he was in constant pain since he had returned to work. Dr. Sculco pulled the Claimant out of work and recommended two to three weeks of bed rest. *Id*. at 28.

The Claimant subsequently remained out of work as he started on another course of physical therapy, and in June 1995, he was evaluated by orthopedic specialist John W. Hayes, M.D. at the request of Employer's attorneys. CX 9. Dr. Hayes examined the Claimant and his medical records, and he went over the Claimant's history. He stated that it was his impression that the Claimant had an initial injury involving his shoulder and neck on May 13, 1991 with subsequent aggravating incidents or recurrences in June 1991, July 1992 and October 1992. He concluded that the Claimant was disabled from his usual occupation as an industrial painter but opined that he was capable of "light selected employment which allows him considerable freedom of change of position and does not require him to work in cramped or awkward positions. *Id*. at 3. He also recommended that the Claimant not do work requiring repetitive bending, heavy lifting, use of the hands and arms overhead, repetitive hand motions or use of vibrating equipment. *Id*.

In December 1995, Dr. Sculco referred the Claimant to William R. Cambridge, M.D. who diagnosed a right rotator cuff tear for which the Claimant had surgery in January 1996. CX 6 at

1-2. In November 1996, Dr. Cambridge stated that the Claimant had reached a point of maximum medical improvement for the right shoulder injury and that he had a permanent partial disability of 15%. He further stated that the Claimant could return to work in a job that does not require work at or above shoulder level or lifting more than 30 pounds. *Id*. at 6. He also noted that the Claimant reported minimal improvement from the surgery and that he continued to complain of right shoulder discomfort with activity. *Id*.

In January 1997, Dr. Sculco reported that the Claimant still had acromioclavicular joint pain and neck pain with radiation to the right arm brought on by coughing, sneezing, straining and turning. He stated that the Claimant was capable of selected light duty which does not involve climbing ladders, working overhead, working in cramped quarters or working on boats. *Id*. at 35. In June, Dr. Sculco reported that the Claimant was working for the Employer as an escort with continuing right upper extremity symptoms. *Id*. at 36.

After the Claimant underwent carpal tunnel release surgery on both hands at Dr. Sculco's recommendation, he was released by Dr. Sculco to return to work on May 5, 1998 to the limited escort duty that he was previously performing. *Id*. at 42. In January 1999, Dr. Sculco reported that the Claimant had developed increasing low back pain following an injury that took place at work on October 28, 1993. *Id*. at 44. He ordered a MRI which showed annular bulges at the L3-L5 levels and a mils, broad L5-S1 disc extrusion. *Id*. at 45. Dr. Sculco recommended epidural steroid injections followed by physical therapy, and he reported in December 1999 that the Claimant had worsening low back pain which would limit his work to three to four hours per day, three days per week. *Id*. at 47-49. In March 2000, Dr. Sculco approved the Claimant working as an escort on a part-time basis with numerous restrictions for the remainder of that year. *Id*. at 72-73.

Following the Claimant's injury at work on June 8, 2000, he was seen by Dr. Willetts at the request of the Employer's workers' compensation administrator on August 7, 2000. RX 7. At that time, it appears that the Claimant had been out of work since June 28, 2000 when he had seen Dr. Sculco and been placed on bed rest and Percocet. *Id*. at 2. Dr. Willetts examined the Claimant and reviewed medical records including an MRI of the lumbar spine taken on July 5, 2000 which he found to be unchanged from the previous MRI taken in January 1999. *Id*. at 5. His impression was "[s]ubjective complaints and symptoms of neck and low back pain since incident of June 8, 2000, with no noted change in physical or radiological findings." *Id*. at 6. He stated that he doubted that the Claimant was any more disabled by the June 8, 2000 injury, and he stated that the June 8, 2000 injury was not the sole cause of the Claimant's disability. He further stated that the Claimant was not disabled and could do a wide variety of selected work if properly motivated. *Id*. Dr. Willetts continued that the Claimant should not lift more than 35 pounds or push or pull more than 50 pounds. He also stated that the Claimant should avoid using vibrating tools, but he could otherwise sit, stand, walk, drive and climb/descend stairs and ladders provided that he could occasionally change positions as comfort dictates. He suggested that the Claimant should return to work four hours per day, adding one hour per day weekly until reaching full-time status, and he stated that the Claimant had reached a point of maximum medical improvement from the effects of the June 8, 2000 injury as of July 20, 2000, six weeks post-injury. *Id*. at 7.

Dr. Sculco disagreed with Dr. Willetts and wrote on September 6, 2000 that he had reevaluated the Claimant and that it was his opinion that the Claimant remained temporarily totally disabled. CX 5 at 74. He prescribed a six-week course of physical therapy, deep heat and massage. *Id*. at 75. In November, Dr. Sculco released the Claimant to return to light duty work as an escort, two to three hours per day, three days per week, effective November 27, 2000, with restrictions against climbing, reaching above the shoulder, working in tight or confined areas and lifting, pushing and pulling more than 20 pounds. *Id*. at 76-78. In July 2001, Dr. Sculco made these restrictions permanent. CX 14. He also recommended a hydrotherapy unit for home use, noting that the Claimant had reported improvement with hot tub soaks. CX 17.

In his June 29, 2001 letter, Dr. Willetts provided the following opinion after viewing the surveillance videotape:

> In summary, this videotape was one and one-quarter hours long, showed Mr. Intrieri very capable of a wide variety of activities, including ladder climbing, working with both hands high overhead, handling electric drills, using a claw hammer to pry wood material from overhead and from vertical posts, to crouch, stoop, kneel, and to bend without any apparent difficulty. There was no guarding, no expression of pain, or splinted movement.
>
> It is clear that as of May 11, 2001, Mr. Intrieri was not only not disabled, but was able to do a wide variety of productive work. Any representations to the contrary should be investigated thoroughly, but treated with considerable skepticism.
>
> Despite the labels of total disability placed by Dr. Sculco, June 28, 2000, through January 10, 2001, Mr. Intrieri is clearly not totally disabled but rather is capable of a wide variety of productive work.

RX 8 at 2-3. Dr. Willetts testified at a post-hearing deposition on July 24, 2001. RX 11. He stated that the surveillance videotape "showed that he [the Claimant] was able to do activity very compatible with what I opined on August 7, 2000. *Id*. at 16. Thus, the additional information Dr. Willetts obtained from watching the videotape did not alter his opinion regarding the extent of the Claimant's ability to work.

In addition to the usual questions designed at showing bias (*e.g.* how much money has he earned from provided medical opinions to the Employer), Dr. Willetts was asked on cross-examination about Dr. Sculco's recommendation that the Claimant have a hydrotherapy unit in his home. He responded that he did not consider such a device to be medically reasonable or necessary:

> Q. Doctor Sculco recommended that Electric Boat purchase a hot tub for Mr. Intrieri's home use. Do you think this is reasonably necessary for treatment of his neck and back?

A. Even you, Mr. Neusner, cannot keep a smile from your face with that question. And I can say that it is neither reasonable nor necessary for any work injury for Mr. Intrieri to have a hot tub.

Q. Do you ever think that that's appropriate treatment for cervical or lumbar disc disease?

A. I don't think that a specially installed hot tub is ever necessary. A regular tub bath can occasionally be relieving. It is never curative. But I don't ever really think that a person has to have a spa or a hot tub.

Id. at 19-20. Dr. Willetts testified in greater detail regarding his opinions at an earlier deposition taken on February 4, 2000. RX 10. He reviewed his November 1999 examination findings and noted the Claimant had a normal straight leg raising test which he said "strongly indicates that there is a non-physical basis to his representation, and it calls into serious question whether there is any irritation of the sciatic nerve at all." *Id*. at 8. Dr. Willetts also commented on the December 1, 1999 report from Dr. Sculco who found that the Claimant had limited straight leg raising, decreased ankle reflexes and back range of motion limited to 50% of normal (CX 5 at 49). He stated that these findings were not consistent with his examination findings just nine days earlier, and he observed that Dr. Sculco's report only mentions a "standard" straight leg raising test, where he had performed a "distracted" test which, he explained, is better suited to eliciting only genuine physiological response. *Id*. at 10-11. Dr. Willetts also commented that he found "trace" ankle reflexes within the normal range, much better than 50% range of motion, normal muscle strength and no spasm. *Id*. at 11. He added that Dr. Sculco's examination was "somewhat limited . . . [a]nd the only findings that would be read as positive in interpreting Dr. Sculco's examination were belied by a distracted normal straight leg raising in my examination and secondly were contradicted by a very much better motion when I saw him than Dr. Sculco stated that he found." *Id*. at 12. Dr. Willetts reiterated his opinion that the Claimant is not totally disabled but stated that he should be restricted from lifting more than 35 pounds, any repetitive lifting above the shoulders, pushing and pulling more than 50 pounds and using vibrational tools. *Id*. at 13. He also stated that the Claimant, in his opinion, could work a full 40 hour week. *Id*. at 16. Dr. Willetts further testified that it was his opinion that neither the July 19, 1992 neck and shoulder injury nor the October 27, 1993 low back injury are the sole cause of the Claimant's disability, stating,

> He had extensive documentation of previous injuries to the same general area. This examiner had seen him following a May 13, 1991 claimed injury in the right shoulder and neck area. There had been an injury for which he had seen Dr. Carlow [on] July 18, 1990, regarding the right shoulder. There had been a March 13, 1989 right shoulder injury. There had been complaints of a back injury [on] September 10, 1986. And when Dr. Carlow saw him [on] August 2, 1990, there had been an injury stated by both him and the physical therapist that he sent Mr. Intrieri to of approximately ten to 13 years before 1990.

Id. at 14-15. Dr. Willetts thus was of the opinion that any disability the Claimant suffers as a result of the July 19, 1992 and October 27, 1993 injuries was made materially and substantially greater as a result of the Claimant's pre-existing neck and right shoulder injuries. *Id*. at 15. He stated that it was his opinion that the Claimant reached maximum medical improvement on March 27, 1995, six months after his September 1994 neck surgery. He also stated that the Claimant reached a point of maximum medical improvement with respect to his right shoulder on November 6, 1996 and that the point of maximum medical improvement from any back injury on October 27, 1993 would be six months later or April 27, 1994. *Id*. at 16.

C. Vocational Evidence

The Employer introduced a vocational analysis and employability evaluation dated April 8, 2001 from Cherie L. King, M.Ed., CRC, CMDS, a fellow of the American Board of Vocational Experts. RX 9. Ms. King was provided with a file which contained the transcripts of the Claimant's testimony at depositions in September 1995 and January 2000. *Id*. at 1. She stated that the Claimant's usual work as a painter is classified in the medium to light range as he was required to lift up to 50 pounds occasionally or lift and carry up to 10-20 pounds frequently. She also stated that the Claimant had been required to frequently climb, stoop, balance, kneel, crouch, and frequently reach, handle and finger. *Id*. at 2. From the medical records, Ms. King concluded that the Claimant has a residual functional capacity for light work since he is capable of lifting up to 20 pounds occasionally and is able to sit, stand, and walk intermittently up to four hours per day. *Id*. at 3. Based on her assessment of the Claimant's residual functional capacity and her assessment of the Claimant's transferable skills, she concluded that alternative occupations as security guard and parking lot attendant are within with his physical abilities, specific vocational preparation levels, GED levels, vocational aptitudes, and temperaments. Ms. King also included a labor market survey in her report which lists the following jobs:

> EPSS Group. Inc., New London, CT. This employer is hiring for part and full time security guards on all shifts. Ability to observe, communicate and occasional driving around facility is required. Starting wages are $8.29 per hour.
>
> William Backus Hospital, Norwich, CT. This employer is hiring for security guards and patient escorts/delivery. Positions require occasional walking, and no lifting over 20 lbs. Starting wages range from $7.50 to $8.50 per hour.
>
> Ace Security, Waterford, CT. This employer is hiring for part and full time security guards for all shifts. Jobs require walking, standing and sitting intermittently. Starting wages $7 to $9 per hour.
>
> Burns Security, Salem, CT. This employer is accepting applications for several openings in the New London and Norwich areas. Positions require standing, walking and occasional sitting. Starting salary $7 and $8 per hour.

DB Kelly Associates, Providence, RI. This employer is hiring for part and full time guards in various locations throughout RI. Various openings include facility or corporate site security. Ability to sit, stand, and walk intermittently is required. Starting wages $8 to $9 per hour.

Guardsmark, Providence, RI. This employer is accepting applications for many part and full time guard positions. Jobs are light in nature. Starting wages $8 to $9 per hour.

Hilltop Inn, No. Stonington, CT. This employer is looking for security guard for evening shift for part time or full time. Responsibilities include greeting guests, control entry of gate and driving patrol of grounds. Employer will train. Starting wages $9 per hour.

Deep River Navigating Company, Deep River, CT. Employer is looking for part time and full time Ticket Agent/Cashiers to sell tickets from booth for riverboat rides. This is a seated position. Will train on cash register operation and charge card transactions. Ability to perform simple math is required. Starting wages $8 per hour.

Pro Park, New London, CT. This employer is accepting applications for part and full time parking lot booth cashiers. Job is performed seated or standing. Starting wages $6.25 to $7 per hour.

Bennett Security Guards, Norwich, CT. Several part and full time positions are available with this employer. Starting wages are $7 to $8.50 per hour.

Id. at 3-4. Ms. King concluded that it is her opinion that the Claimant is readily employable in the general labor market and that the jobs identified in her labor market survey exist in significant numbers in the Claimant's area, paying wages between $6.25 and $9.00 per hour. *Id*. at 4.

The Claimant responded to the Employer's vocational evidence with two reports and deposition testimony from Carl Barchi, M.Ed., CDMS. The first report from Mr. Barchi is actually a vocational assessment that he did on July 20, 1995 for the Employer's workers' compensation administrator. CX 4. Mr. Barchi reviewed the Claimant's employment and medical records, and he also interviewed the Claimant. Regarding the Claimant's educational background and communication skills, he noted that the Claimant has no formal education or training outside of elementary education in Italy and that "[h]e does not read or write in English, and while he understands spoken English very well, he is deficient in his ability to speak clearly." *Id*. at 2. Mr. Barchi stated that based on his review of the medical records, the Claimant's ability to return to work was limited by a number of medical problems. *Id.* at 2. He stated that the Claimant possibly could return to selective light assembly work which does not involve repetitive manual motions, but he cautioned that this type of work, though made available by the Employer in the past, is difficult to find in the open labor market. He further stated that it would be more appropriate,

given the Claimant's medical restrictions, to limit him to the work of an entry level Security Guard, but he added that the Claimant's lack of a high school education and inability to speak English clearly may be impediments to obtaining employment as a security guard. *Id.* at 3.

At the request of the Claimant's attorney, Mr. Barchi also authored a rehabilitation evaluation dated January 30, 2001. CX 3. Referring to his earlier assessment, Mr. Barchi stated that he had concluded in 1995 that the Claimant was very limited in terms of marketable transferable work skills but might attempt to return to light duty work as a security guard. However, he stated that he no longer believed that the Claimant has any residual transferable work skills or any reasonable potential for competitive job placement, vocational rehabilitation or training. *Id.* at 1. He reviewed the medical opinions regarding the Claimant's work capacity from Drs. Sculco and Willetts and decided that Dr. Sculco's assessment was more reliable for the following reasons:

> Dr. Willetts found Mr. Intrieri able to perform "a wide variety of selected work, if he should acquire the motivation and incentives to do so." It was difficult for this vocational counselor to separate Dr. Willetts' personal opinions regarding Mr. Intrieri's psychological motivation from the doctor's medical opinions regarding Mr. Intrieri's residual functional capacities. Dr. Willetts did opine a part time work capacity -- beginning four hours per day, five days per week and gradually adding one hour per day each week until a full work week is achieved -- but then adds that this return to work would be possible "if he acquires the motivation to do so." Because Dr. Willets' comments stray from the purely medical to the psychological/psychiatric, I thought it more appropriate to use treating physician Sculco's restrictions so noted for the purposes of my report. In addition, I would add that I am aware of no employers who would accommodate such a gradual return to a full time assignment as proposed by Dr. Willetts. As such, I deem Dr. Willetts' view of employers' attitudes as unrealistic at best.

Id. at 2. Mr. Barchi thus concluded that the Claimant is not able to return to competitive employment:

> Mr. Intrieri has engaged in a medium-duty occupation most of his working life. Due to physical restrictions resulting from his job injury, he is unable to return to his former occupation. He is able to speak English, but he does so with a heavy Italo-American accent. He cannot read or write in English. Because of poor language skills, there is the potential of his being perceived as less intelligent than he might be. Interpersonally, he presents as an individual who is amiable and generally self-confident but also very pre-occupied with multi-site complaints of chronic pain. After several years of steadily-declining physical ability to work, he is convinced that he cannot return to any work due to his chronic pain and now-unusable job skills. Based on my own analysis, I think his assessment is realistic and accurate.

> A Transferable Skills Analysis (TSA) conducted by Self Work found no alternative occupations in which Mr. Intrieri would be immediately qualified or marketable.[3]
>
> Given 1) Mr. Intrieri's above-noted and very limiting work-related physical restrictions, 2) his lack of transferable skills, 3) his minimal, formal education and 4) his particular narrowly-focused job history and 5) his not having worked competitively on a part time or full time basis since 1995, I find him to he totally unemployable. Further and for similar reasons, I do not think Mr. Intrieri is a viable candidate for either retraining or job placement. His vocational prognosis is consequently poor to nil. As such no vocational rehabilitation plan is currently being proposed.

Id. at 2-3. At his deposition which was taken on June 13, 2001, Mr. Barchi testified that although he had suggested in his 1995 vocational assessment that the Claimant might be able to work as a security guard, he had overlooked the Claimant's lack of a high school diploma or G.E.D. and that there are very few exceptions where a security employer will consider hiring an individual without this basic educational qualification. *Id.* at 11. He added that security guards may face "unusual" situations dealing with people where the Claimant's physical limitations could prove problematic and that most security guards must have a pretty good command of the English language. *Id.* at 12-13.

Mr. Barchi testified that it appeared to him the Claimant's medical condition had substantially deteriorated between 1995 and 2001, and he did not consider the escort work the Claimant was doing at the Employer on a sporadic basis to be legitimate, bona fide part-time employment. *Id.* at 17-19. Rather, it was his opinion that the Employer was acting as a "benevolent employer." *Id.* at 20.[4] Mr. Barchi also commented on the jobs listed in Ms. King's labor market survey. Regarding the position of parking lot attendant, he testified that an attendant, like a security guard, generally must have a good command of English. *Id.* at 23. He also stated that a parking lot attendant may face situations where highly repetitive use of the hands is required, such as when there is a long line of customers paying parking fees, as well as frequent reaching. *Id.* at 24-25. He also noted that a parking lot attendant must be able to make change and operate a computer or cash register, functions which the Claimant has not demonstrated any ability to perform. *Id.* at 26.

On cross-examination, Mr. Barchi stated that he was not familiar with the particular parking lot attendant jobs in Ms. King's labor market survey or the frequency with which security guards are assaulted on the job. *Id.* at 27-28. He also stated that he was able to understand the

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[3] The transferrable skills analysis referred to by Mr. Barchi is not in the record.

[4] The Employer's objection to the question which elicited this answer is overruled as Mr. Barchi is competent, as a vocational expert, to express an opinion on whether the Claimant's light duty assignment as an escort constituted competitive or sheltered employment.

Claimant during his interviews, and he acknowledged that the Claimant would have been required to have some basic communication skills in order to perform the escort job. *Id.* at 29-30. Finally, he testified that he had not personally viewed any of the security guard jobs listed in the labor market survey. *Id.* at 32.

IV. Findings of Fact and Conclusions of Law

A. Jurisdiction over the June 8, 2000 Injury

The question of whether an injured employee's claim for benefits is covered generally requires an inquiry into the situs of the injury (the "situs test") and the status of the injured worker (the "status test"). *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264-65 (1977) (*Caputo*). With respect to situs, section 3(a) of the Act in pertinent part states that "compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. §903(a). Status is addressed by section 2(3) of the Act which defines a covered employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker but such term does not include – (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work . . . ." 33 U.S.C. §902(3).

1. Did the Claimant have covered maritime status on June 8, 2000?

The Claimant contends that any jurisdictional issue regarding his June 8, 2000 injury is resolved by the Benefits Review Board's decision in *Dobey v. Johnson Controls*, 33 BRBS 63 (1999) where the Board held that traffic officer/security officer injured while on a maritime patrol has covered status under section 2(3) because the maritime patrol was a regular part of his duties and exposed him to traditional maritime hazards and because his maritime patrol work was not the type of security work that Congress sought to exclude from coverage under section 2(3)(A). Claimant's Closing Argument at 3. The Employer responds that *Dobey* is distinguishable because the injured employee in that case was actually required to go on patrol boats over navigable waters while the Claimant in this case went into the shipyard as an escort but was not required to go onboard submarines under construction. The Employer similarly distinguishes *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991) since the security guard found covered by the Act in that case was required to go aboard submarines. Employer's Closing Argument at 2. In contrast to those cases, the Employer submits that the Claimant was employed exclusively to perform security work within the meaning of section 2(3)(A), and it contends that his function as an escort was not integral to the shipbuilding process and only existed because the Employer builds submarines for the Department of Defense which requires that individuals without security clearances be escorted while working within the shipyard. Employer's Closing Argument at 1.

In *Dobey*, the Board looked to the legislative history of section 2(3)(A) and noted that the House and Conference Committee reports on the 1984 amendments to the Act indicated that Congress intended the exclusion to be read narrowly and to only apply to workers who are confined physically and by function to administrative areas and, thus, who are not exposed to traditional maritime hazards. 33 BRBS at 66-67, citing H.R. Rep. No. 98-570, *reprinted in* 1984 U.S. Congressional & Admin. News 2734, 2736; 130 Cong. Rec. H.9731 (Sept. 18, 1984); H. Conf. Rep. No. 98-1027, *reprinted in* 1984 U.S. Congressional & Admin. News 2734, 2772. Since a regular and necessary portion of *Dobey's* duties as a traffic officer/security officer required him to leave the security office and conduct marine patrols on navigable waters, the Board held that such duties were sufficient to remove him from the section 2(3)(A) exemption, especially as Congress had made it clear that the exemption is to be applied in an "either-or" fashion; that is, an employee is either not covered by the Act because he or she is engaged exclusively in work within the exemption or the employee is covered at all times because he or she is not exclusively and solely engaged in work qualifying for the exemption. 33 BRBS at 67, quoting H.R. Rep. No. 98-570, *reprinted in* 1984 U.S. Congressional & Admin. News 2734, 2736. The Board also relied on *Spear* where it held that the ALJ rationally concluded the claimant security guard was not exclusively engaged in security work because he helped ensure a safe working environment in the shipyard by performing various fire and safety duties on a regular basis in addition to spending several hours onboard submarines as a night watchman. On the other hand, the Board has held that a production clerk, who spent 80 percent of his time working in a house trailer and 20 percent of his time making rounds in the shipyard to gather and deliver correspondence and summon people to meetings but who never worked on actual building or repairing of ships or assisted in loading or unloading of cargo, was excluded from coverage by section 2(3)(A). *Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228, 230 (1998).

As the Employer suggests, *Dobey* and *Spear* can be distinguished from the instant case based on the fact that the Claimant never went aboard a submarine or onto a navigable waterway while working as an escort. However, the record does show that he regularly accompanied contractors into secure shipyard areas so that they could perform maintenance and repair work on cranes and buildings used in the process of constructing submarines. Maintenance and repair of shipyard cranes and other shipyard equipment and structures used in shipbuilding is an integral or essential function of the shipbuilding process, and workers who perform such maintenance and repair have covered maritime status. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 45-47 (1989) (railroad workers whose duties included maintenance and repair of equipment used to convey coal from rail cars to ships' holds have maritime status). While the Claimant did not actually perform any maintenance or repair work himself, I find that his escort duties were integral or essential to the Employer's shipbuilding process because the record shows that the contractors required an escort in order to enter the shipyard and perform their work. The fact that it would be possible, in the absence of the Department of Defense security clearance regulations, to build a submarine without having contractors escorted is irrelevant since the Employer's shipbuilding process is governed by those regulations. *See Marinelli v. American Stevedoring, Ltd.*, 248 F.3d 54, 58-60 (2nd Cir. 2001) (affirming ALJ's finding that a union shop steward whose position was established pursuant to a collective bargaining agreement was an integral and essential part of the employer's maritime business because he facilitated resolution of labor disputes which had the

potential to interrupt maritime operations).[5] Based on the fact that the Claimant's escort work necessarily took him outside of the office and administrative environment and into the shipbuilding areas where he was exposed to the same traditional maritime hazards as any other employee working in the shipyard, and in view of my finding that his escort duties were integral or essential to the Employer's shipbuilding process, I conclude that his position is more closely analogous to the extra-office security and safety functions found covered in *Dobey* and *Spear* than it is to the clerical and administrative functions performed by the production clerk in *Ladd*. Therefore, I conclude that the Claimant did not perform exclusively office security functions within the meaning of the section 2(3)(A) exemption and that he had covered maritime status at the time of the June 8, 2000 injury.

2. Did the Claimant's June 8, 2000 injury occur on a covered situs?

The Employer appears to also contend, without elaboration, that the Claimant was not injured on a covered maritime situs since "the actual injury was in the administrative office when he fell from a chair." Employer's Closing Argument at 2. As discussed previously, section 3(a) of the Act defines a covered situs as being located on the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. Coverage of a situs under section 3(a) depends on the nature of the place of work at the moment of injury. *Melerine v. Harbor Construction Co.*, 26 BRBS 97, 100 (1992); *Alford v. MP Industries of Florida*, 16 BRBS 261, 263 (1984). Although the record does not disclose the precise location of the security office where the injury occurred, I find that it is reasonable to infer from the totality of evidence, including the fact that the Claimant walked from the office to the work areas where he escorted the contractors, that the office is geographically located within the confines of the Employer's shipyard. *Cf. Sidwell v. Express Container Services, Inc.*, 71 F.3d 34 (4th Cir. 1995) (injury situs outside of property lines of area where maritime operations conducted did not adjoin navigable waterway), *cert. denied*, 518 U.S. 1028 (1996); *Griffin v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 87 (1998) (injury situs separated by a fence and road from area where shipbuilding operations were conducted not covered). Accordingly, I conclude that the security or administrative office where the injury occurred constituted an adjoining area within the meaning of section 3(a).

B. Nature and Extent of the Claimant's Disability

The Claimant seeks permanent partial disability compensation for his July 19, 1992 injury at the weekly rate of $346.72 which represents 2/3 of the difference between his stipulated

[5] The Court in *Marinelli* rejected the employer's arguments that the shop steward did not satisfy *Schwalb's* integral or essential test because (1) nonunion longshoring operations function better without a steward, (2) ships were loaded and unloaded in the steward's absence and (3) the steward's duties were the same as a shop steward in a Kansas tire plant. 248 F.3d at 59-60.

average weekly wage of $668.16 and his stipulated weekly wage earning capacity of $147.28. He also seeks permanent total disability benefits for the June 8, 2000 injury at the weekly minimum compensation rate of $128.00. Claimant's Closing Argument at 3. "Disability" is an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. §902(10). Thus, the concept of disability under the Act is economic as well as medical. *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). "The degree of disability in any case cannot be measured by physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, and the availability of that type of work which he can do." *American Mutual Ins. Co. of Boston v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970).

1. The Claimant's Ability to Return to His Usual Employment

In a claim for disability compensation that is not based on the schedule of losses in section 8(c) of the Act, a claimant has the initial burden of establishing that he can not return to his usual employment. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). A claimant's usual employment is defined as the regular duties the claimant was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 693 (1982). To determine whether a claimant has carried his or her *prima facie* burden of establishing an inability to return to usual employment, the administrative law judge must compare the medical opinions regarding the claimant's physical limitations with the requirements of the claimant's usual work at the time of the injury. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 103 (1988).

The Claimant was employed as a painter at the time of the July 19, 1992 injury, and his regular duties included sandblasting, painting with sprayers and rollers, and cleaning up shipyard debris. He testified that he had to climb ladders, carry equipment and frequently squeeze into confined spaces. Ms. King, the Employer's vocational expert, analyzed the Claimant's usual work as a painter and reported that he was required to lift up to 50 pounds occasionally or lift and carry up to 10-20 pounds frequently. She also stated that the Claimant had been required to frequently climb, stoop, balance, kneel, crouch, and frequently reach, handle and finger. Based on the physical restrictions identified by Drs. Willetts and Sculco, it is clear, as Ms. King concluded, that the Claimant is not able to return to his usual employment as a painter. Indeed, the Employer concedes as much. Employer's Closing Argument at 2. The Claimant did subsequently work for the Employer in a light duty capacity as an escort. However, I find that this light duty assignment did not constitute the Claimant's usual employment because the evidence shows that the escort duties were specifically tailored to accommodate his injury-related limitations and that such accommodations do not generally exist in competitive employment. Therefore, I conclude that the Claimant has met his burden of establishing that he would be unable to perform his usual work as a painter.

2. Suitable Alternative Employment

Since the Claimant has established that he is unable to return to his usual work because of work-related injuries, the burden shifts to the Employer to demonstrate the availability of suitable

alternative employment; that is, realistic job opportunities which the Claimant is capable of performing and which he could secure if he diligently tried. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991) (*Palombo*); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981) (*Gulfwide Stevedores*); *Preziosi v. Controlled Industries,* 22 BRBS 468, 471 (1989). If the Employer does not carry this burden, the Claimant is entitled to a finding of total disability. *American Stevedores v. Salzano,* 538 F.2d 933, 935-36 (2d Cir. 1976); *Rogers Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986). To satisfy its evidentiary burden, "the employer does not have to find an actual job offer for the claimant, but must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo,* at 74, citing *Gulfwide Stevedores* at 1042-43. Once an employer satisfies its burden, a claimant may rebut the showing of suitable alternative employment by establishing "that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo,* at 74, quoting *Gulfwide Stevedores* at 1043.

The labor market survey conducted by the Employer's vocational expert identifies several jobs as a security guard which appear to be compatible with the Claimant's physical limitations. The Claimant himself has testified that he is able to do some work and that he thinks he could do the job of a security guard. The labor market survey also identifies a position as a parking lot attendant/cashier which appears to fit within the restrictions recommended by Dr. Willetts but not the additional restrictions on frequent reaching recommended by Dr. Sculco. The Claimant's vocational expert, Mr. Barchi, testified that the Claimant's lack of a high school diploma or G.E.D. and his limited ability to read, write and communicate in English make it unlikely that he would be successful in obtaining employment as a security guard or as a parking lot attendant/cashier. The Claimant's difficulty with English were readily apparent during his testimony at the hearing, and I find it significant that Ms. King did not interview the Claimant or consider his lack of any English language education and limited communication skills in determining that he could find competitive employment. Because Ms. King did not address these important vocational limitations, I give greater weight to Mr. Barchi's opinions and thus conclude that the Employer has not met its *Palombo* burden of establishing the existence of jobs that the Claimant could compete for and realistically and likely secure.[6] Moreover, even assuming for argument's sake that the Employer had made a sufficient showing of suitable alternative employment, I find that the Claimant has successfully rebutted the showing based on his credible testimony, which is supported by documentary evidence (CX 10 and 13), that he has been unable

[6] An employer can also meet its burden of demonstrating the availability of suitable alternative employment by offering light duty work within an injured worker's restrictions, provided that the work to be performed is necessary and not merely the creation of a beneficent employer. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986); *Swain v. Bath Iron Works Corp.*, 17 BRBS 145, 147 (1985). While the Employer made light duty work as an escort available to the Claimant in the past, the Claimant testified that no light duty work has been offered after June 8, 2000.

to secure employment despite making over 100 job applications and contacts since September 2000.

Based on my finding that the Employer has not established that suitable alternative employment is available, I conclude that the Claimant is entitled to a finding of total disability from June 8, 2000 to the present. Prior to June 8, 2000, I find that the Claimant was partially disabled based on the parties' stipulation that he had a wage-earning capacity of $147.28 per week. The parties have also stipulated that the Claimant reached a point of maximum medical improvement from the July 19, 1992 injury on November 6, 1996. This stipulation is consistent with the medical evidence, and I therefore find that the Claimant's disability has been permanent in nature since November 6, 1996. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *See also Watson v. Gulf Stevedore Corp*., 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

C. Amount of Compensation Due and Employer Credits

Pursuant to section 8 of the Act, the amount of the Claimant's disability compensation is calculated from his average weekly wage. 33 U.S.C. §908. In cases involving a traumatic injury, the average weekly wage is calculated as of the time of injury for which compensation is claimed. 33 U.S.C. §910; *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 149 (1991); *Sproull v. Stevedoring Services of America*, 25 BRBS 100, 104 (1991); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196, 200 (1989); *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 193 (1984); *Hasting v. Earth-Satellite Corp.*, 8 BRBS 519, 524 (1978), *aff'd in pertinent part*, 628 F.2d 85 (D.C. Cir.1980), *cert. denied*, 449 U.S. 905 (1980).

The Claimant's entitlement to compensation commencing November 6, 1996, the date of permanency, is controlled by section 8(c)(21) of the Act which provides that in cases of permanent partial disability not covered by the schedule of losses "compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability." 33 U.S.C. §908(c)(21). Calculating the amount of compensation under section 8(c)(21) therefore requires a comparison of the Claimant's stipulated average weekly wage at the time of the July 19, 1992 injury ($668.16) with his stipulated post-injury wage-earning capacity ($147.28). *LaFaille v. Benefits Review Board*, 884 F.2d 54, 60 (2nd Cir. 1989) (*LaFaille*). These stipulated figures produce a weekly compensation rate of $346.72 for the period of November 6, 1996 through June 7, 2000.

For the period of permanent total disability commencing on June 8, 2002, I find that the Claimant is entitled to an award of compensation pursuant to section 8(a) of the Act at the stipulated minimum rate of $128.00 per week.

Since the parties have also stipulated that the Employer has previously paid periods of temporary total and temporary partial disability compensation, I find that the Employer is entitled to a credit in the amount of its prior compensation payments pursuant to section 14(j) of the Act.

Balzer v. General Dynamics Corp., 22 BRBS 447, 451 (1989), *aff'd on reconsideration*, 23 BRBS 241 (1990); *Scott v. Transworld Airlines*, 5 BRBS 141, 145 (1976).

D. Entitlement to Special Fund Relief

Section 8(f) of the Act limits an employer's liability for permanent partial, permanent total disability and death benefits to a period of 104 weeks, after which compensation liability is assumed by a Special Fund established pursuant to 33 U.S.C. §944, when the disability or death is not due solely to the injury which is the subject of the claim. 33 U.S.C. §908(f); *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). To avail itself of relief under this provision, an employer or insurance carrier must file an application with the District Director (formerly the Deputy Commissioner) of the Department of Labor's Office of Worker's Compensation Programs (OWCP) pursuant to section 8(f)(3) which, as amended, provides:

> Any request, filed after September 28, 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore, shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3). The record shows that the Employer submitted its application for Special Fund relief while the claim was pending before the District Director who stated that she was unable to make a determination. ALJX 5, 7. Thus, the OWCP has not raised the section 8(f)(3) absolute defense. *Cf. Tennant v. General Dynamics Corp.*, 26 BRBS 103, 107 (1992) (where the absolute defense is asserted, the administrative law judge can not consider the merits of the employer's section 8(f) application before initially considering whether the request submitted to the district director was sufficiently documented as required by 20 C.F.R. §702.321).

Turning to the merits, an employer must meet three requirements to avail itself of section 8(f) relief. The first two requirements are: (1) the employee must have had a pre-existing permanent partial disability; and (2) the pre-existing disability must have been manifest to the Employer. *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 793 (2nd Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305 (2nd Cir. 1992) (*Luccitelli*). In cases involving a permanent partial disability, the third requirement that an employer must meet is a showing that the Claimant's disability is "materially and substantially" greater than would have resulted from the subsequent injury alone. 33 U.S.C. §908(f)(1). The "subsequent" injuries in the case for section 8(f) purposes are the July 19, 1992 and June 8, 2000 injuries. The Employer contends that the Claimant's prior neck and right shoulder injuries, including the workplace injury reported on July 13, 1990, combined with the subsequent injuries in 1992 and 2000 to make his

current disability materially and substantially greater than would have resulted from the subsequent injuries alone.

As discussed above, the record shows that the Claimant suffered a right shoulder injury on July 18, 1990 which resulted in work restrictions and a neck and right shoulder injury on May 13, 1991 which resulted in further restrictions. The medical evidence also shows that the Claimant had a significant herniated cervical disc by November 1991 and that his symptoms and restrictions from the prior injuries had persisted for a sufficient period of time to be considered permanent in nature. Based on this uncontradicted medical evidence, I find that the Employer satisfies the first requirement that the Claimant have a pre-existing permanent partial disability.

Regarding the second requirement, the Benefits Review Board has held that, "[i]t is well established that a pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." *Esposito v. Bay Container Repair Co.*, 30 BRBS 67, 68 (1996). The Claimant's July 1990 and May 1991 injuries both occurred at work and were reported to the Employer. In addition, the record shows that medical reports concerning these injuries and resulting limitations were provided to the Employer. Therefore, I find that the Claimant's pre-existing permanent partial disability was manifest to the Employer.

Regarding the third requirement, Dr. Willetts reviewed the medical records and testified that it was his opinion that the Claimant had pre-existing neck and right shoulder impairments which combined with the Claimant's subsequent injuries to produce a level of disability which is materially and substantially greater that would be the case based on the subsequent injuries alone. Noting that there is no contrary medical evidence, and noting that the seriousness of the Claimant's pre-existing neck condition is well documented by the MRI study and report from Dr. Sculco in November 1991, I find that the Employer satisfies the third and final requirement for Special Fund relief.

In view of my finding that the Employer has satisfied the requirements for Special Fund relief under section 8(f) of the Act, its liability for the Claimant's permanent partial disability benefits is limited to the maximum period of 104 weeks commencing on November 6, 1996 when the Claimant's partial disability reached maximum medical improvement and became permanent. 33 U.S.C. §908(f)(1). *See Murphy v. Pro-Football, Inc.*, 24 BRBS 187, 190-91 (1991) (where a claimant is entitled to multiple periods of permanent disability compensation, section 8(f) limits employer's liability to one 104 week period).

E. Medical Care

An Employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Parnell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). An award of Special Fund

relief under section 8(f) does not relieve an employer of its liability for a claimant's medical benefits pursuant to section 7(a). *Barclift v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 418, 421 (1983), *rev'd on other grounds sub nom Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295 (4th Cir. 1984); *Scott v. Rowe Mach. Works*, 9 BRBS 198, 200-01 (1978); *Spencer v. Bethlehem Steel Corp.*, 7 BRBS 675, 677 (1978); *Duty v. Jet America, Inc.*, 4 BRBS 523, 531 (1976). The Employer has not disputed its liability for continuing medical care. Accordingly, I will order that the Employer pay for any future medical treatment which may be reasonable and necessary for the Claimant's work-related injuries.

F. Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney's Fees

Having successfully established his right to compensation and medical benefits, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976); *Ingalls Shipbuilding v Director, OWCP*, 920 F.2d 163, 166 (5th Cir. 1993). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. §702.132, and the Employer and Carrier will be granted 15 days from the filing of the fee petition to file any objection.

H. Conclusion

In sum, I have concluded that the Claimant is entitled to an award of permanent partial disability compensation for the period of November 6, 1996 through June 7, 2000 and permanent

total disability commencing June 8, 2000 and continuing. The permanent disability benefits will be paid by the Employer for a period of 104 weeks, commencing November 6, 1996, and by the Special Fund pursuant to section 8(f) of the Act after expiration of the Employer's 104 week liability. Since the Employer has previously paid temporary total and partial disability compensation to the Claimant, I have concluded that it is entitled to a credit in the amount of these past payments pursuant to section 14(j) of the Act. Finally, I have determined that the Employer is liable for reasonable medical care necessitated by the Claimant's work-related injuries, attorney's fees and interest on unpaid compensation.

V. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Electric Boat Corporation, shall pay to the Claimant, Adelmo Intrieri, permanent partial disability compensation benefits pursuant to 33 U.S.C. §908(c)(21) at the weekly compensation rate of $346.72 commencing November 6, 1996 and continuing thereafter for 104 weeks;

2. The Employer shall be allowed a credit pursuant to 33 U.S.C. §914(j) for prior payments of temporary total and partial disability compensation;

3. After the cessation of payments by the Electric Boat Corporation, the remainder of the Claimant's permanent partial disability compensation benefits shall be paid, pursuant to 33 U.S.C. §908(f), from the Special Fund established at 33 U.S.C. §944 through June 7, 2000;

4. The Special Fund shall pay the Claimant permanent total disability compensation pursuant to 33 U.S.C. §908(a) commencing June 8, 2000 at the applicable minimum compensation rate of $128.00 per week and continuing until further order;

5. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries may require pursuant to 33 U.S.C. §907;

6. The Employer shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

7. The Claimant's attorney shall file, within thirty (30) days of the filing of this Decision and Order in the office of the District Director, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer who shall then have fifteen (15) days to file any objection; and

8. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts
DFS:dmd